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No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED FOR REVIEW

Whether the Fifth Amendment requires that an accused murderer's confession be suppressed because the police failed to "scrupulously honor" an invocation of the right to silence even though fresh *Miranda* warnings preceded the confession and the statement was freely and voluntarily given.

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OPINION BELOW

The opinion of the Supreme Court of Tennessee filed on May 18, 1992, is designated for publication but has not yet been published. The opinion appears as Appendix "A".

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 18, 1992. This petition was filed within ninety (90) days of that date.

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

U.S. Const. Amend. XIV, § 1:

> All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Melvin Crump was indicted in November, 1988, by the Grand Jury for Davidson County, Tennessee, on one count of first-degree murder, one count of armed robbery and one count of escape from the Department of Correction, where he had been serving terms for murder in the second degree and burglary. Crump filed a pretrial motion to suppress oral and tape recorded statements given by him to the police. In addition to arguing that the police had failed to "scrupulously honor" his invocation of the right to silence, he maintained that his statements

were involuntary and that he had invoked his Sixth Amendment right to counsel at the beginning of the tape-recorded statement given at police headquarters.

An evidentiary hearing was held and it was established that Crump had been incarcerated in the Department of Correction based upon an earlier conviction for the murder of an elderly woman and for robbery. He escaped from a work detail and was subsequently arrested on September 27, 1988, for escape. He was suspected in the rape and murder of an elderly woman, Eliza Mae Smith, who was murdered on the day of his escape from the work detail.

At the time of Crump's arrest, Detective Elam advised him of his *Miranda* rights. Crump did not ask for a lawyer. He did say something to the effect that "he didn't have anything to say right now" or that "he didn't have anything to say". Detective Elam informed him that he was being arrested for escape and that he was being investigated for the murder of an "old lady" to which Crump replied that he "didn't know anything about that". The detective asked no further questions.

Shortly thereafter, Crump was driven to police headquarters. Detective Elam left the automobile in order to attend to some paperwork, leaving Crump in the custody of Detective Moore. Detective Moore had earlier asked Detective Elam if he had read Crump his rights. Detective Elam indicated that he had. Detective Elam believes that he told Detective Moore that Crump had invoked his right to silence but Detective Moore does not recall being so informed. Detective Moore asked Crump if he would

go with him to the scene of the escape and Crump indicated that he would. Detective Moore and another officer then drove Crump to the scene of the escape. No promises, threats or physical force were applied, according to the officers. A conversation ensued between Crump and Detective Smith regarding which route he took on the day of his escape. Crump appeared relaxed and was willing to talk about where he went after the escape.

The officers then drove Crump to the Maxwell House Hotel, where a car had been burglarized shortly after Crump had escaped from the work detail. They asked Crump if he took anything out of a car there and Crump admitted he had. Moore told him that items taken from a car were found at Eliza Smith's house. Crump became silent and they returned to headquarters.

At headquarters, a taped statement was taken. However, prior to this taped statement, Crump was again read his *Miranda* rights and he executed a waiver of rights form. There is an inaudible statement by him on the tape while the officers are reading the *Miranda* rights. Detective Elam testified that Crump was indicating that he did not want "nairn" an attorney, meaning that he did not want an attorney. The trial court found as a matter of fact that Crump did not invoke either his right to counsel or his right to silence prior to confessing at headquarters.

At the evidentiary hearing, Crump maintained that he was taken to a secluded area and beaten at least thirty times and choked until he was willing to confess. He admitted having been arrested more than seven times since 1980 and that he was read his rights on each of these occasions. He further testified quite emphatically

"that he knows his rights". He maintained that Detective Moore whispered words in his ear in order for him to know what to say during the confession.

At the conclusion of the evidentiary hearing, the trial judge found as fact that Crump was not threatened or beaten and that he did not request an attorney. Nevertheless, he found that Crump did invoke his right to silence initially upon his arrest and, because the invocation of the right to silence was not "scrupulously honored," the trial judge suppressed the taped confession made at headquarters after the second set of *Miranda* warnings.

On interlocutory appeal by the State, the Court of Criminal Appeals entered an opinion reversing the decision of the trial court, finding that Crump's confession was voluntary and therefore should be admitted. Subsequently, in a 3-to-2 opinion, the Supreme Court of Tennessee reversed the intermediate appellate court and reinstated the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Tennessee erroneously treats the "scrupulously honor" language found in *Michigan v. Mosley*, 423 U.S. 96 (1975), as an independent constitutional right rather than a prophylactic or ancillary rule. As a result of this error, the court held that Crump's confession could not be admitted solely on the basis of a technical violation of *Mosley*. The petitioner submits that no *constitutional* right was ever violated and the court should not prohibit a jury from hearing the

confession to murder simply because of a technical violation to the prophylactic rule announced by this Court in *Mosley*. Had the Supreme Court of Tennessee engaged in the appropriate analysis and determined whether the taped statement given at headquarters was freely and voluntarily given, a different result would have obtained. The petitioner submits that this Court should grant the writ of certiorari in order to clarify that a technical violation of *Mosley* does not *per se* result in the exclusion of a statement which is otherwise freely and voluntarily given.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE THAT AN ACCUSED MURDERER'S CONFESSION BE SUPPRESSED BECAUSE THE POLICE FAILED TO "SCRUPULOUSLY HONOR" AN INVOCATION OF THE RIGHT TO SILENCE WHERE FRESH *MIRANDA* WARNINGS PRECEDED THE CONFESSION AND THE CONFESSION WAS FREELY AND VOLUNTARILY GIVEN.

The Fifth Amendment to the United States Constitution protects against compulsory self-incrimination. Historically, the privilege against self-incrimination was intended to protect against the abuses found during ecclesiastical inquisitions and star chamber proceedings. *Ullmann v. United States*, 350 U.S. 422, 428 (1956); *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). However, in *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court extended the privilege against self-incrimination to statements made during police interrogation. Additionally, the Court in

Miranda recommended a particular set of warnings that have since become familiar to all Americans as a "procedural safeguard". However, the warnings set out in *Miranda* do not constitute constitutional rights in and of themselves, but are rather a method of attempting to insure that the suspect's Fifth Amendment right is protected. Indeed, the Court in *Miranda* recognized that the constitution does not "necessarily require[] adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." *Miranda*, 436 U.S. at 467.

In *Michigan v. Tucker, supra*, the Court explicitly recognized that *Miranda* created a prophylactic standard. In that case, the police informed the suspect of his *Miranda* rights but failed to inform him that if he could not afford an attorney one would be appointed for him. The suspect's statements led to evidence which would not have been otherwise obtained. This Court held that the evidence was admissible, finding that the "police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards laid down by this Court in *Miranda* to safeguard the privilege." *Id.* at 446. The Court noted that the police conduct was in complete good faith and that the suspect had not been pressured or coerced into giving the statement.

A year later, in *Mosley*, this Court upheld the introduction of a confession after a suspect had invoked his right to silence where the interrogation was about a crime that was not the subject of the earlier interrogation and there had been a substantial passage of time between the invocation of the rights and the continued interrogation.

In *Mosley*, the Court said that an invocation of the right to silence must be "scrupulously honored". Although the Court did permit introduction of the confession, the opinion in *Mosley* appears to retreat from the notion advanced in *Tucker* that *Miranda* warnings are prophylactic and do not necessarily result in the exclusion of evidence when a violation occurs. Petitioner submits that the Court in *Mosley* essentially grafted a second prophylactic rule upon the prophylactic rule advanced in *Miranda*. In addition to informing a suspect that he has the right to remain silent, the State must also "scrupulously honor" that invocation. However, just as a violation of *Miranda* is not a violation of the constitution itself but violates only an ancillary prophylactic rule, a violation of the "scrupulously honor" language in *Mosley* violates at most a second-tier prophylactic rule and not the Fifth Amendment itself.

The notion that the important inquiry in determining whether a confession should be admitted is whether the confession was voluntary was set out with clarity in this Court's opinion in *Oregon v. Elstad*, 470 U.S. 290 (1985). While this Court did not overrule the "scrupulously honor" language in *Mosley*, *Elstad* refined *Mosley* to clarify that the violation of a prophylactic rule does not as a matter of law render a confession coerced and, therefore, inadmissible. Rather, the question is whether the confession was freely and voluntarily made. In *Elstad*, the defendant made incriminating statements at the scene of the arrest prior to any *Miranda* warnings. Subsequently, he was given his *Miranda* warnings and made a full confession. In deciding that the second statement should be admitted, this Court placed great emphasis on the fact

that the defendant confessed after being given his rights a second time, saying that the fact that "a suspect chooses to speak after being informed of his rights is, of course, highly probative" on the issue of voluntariness. *Elstad*, 470 U.S. at 318.

In *Elstad*, the Court explained that the Fifth Amendment proscription against compelled testimony is "fully satisfied" by barring the use only of the statement made without the warnings. The Court concluded that "no further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Elstad*, 470 U.S. at 318. The Court's decision was bottomed largely on the purpose of the Fifth Amendment. As explained by Justice O'Connor, the sole purpose of the Fifth Amendment is to protect against the introduction of coerced confessions. Since the purpose of the Fifth Amendment is to protect against coerced confessions, there is no purpose in suppressing a confession that is the product of a knowing and intelligent waiver of rights.

Thus, the appropriate inquiry is whether the second confession, which the State sought to admit, was voluntarily made or whether it was the product of coercion. The petitioner concedes that the failure of the State to scrupulously honor the invocation of the right to silence is one factor which should be considered in determining whether the statement is voluntary and knowing. However, the inquiry should not end there. In this case, it is quite clear that Crump knew exactly what he was doing when he spoke with the police officers. His statement was not the result of coercion. There is absolutely no credible evidence that the officers in any way "badgered" him or

forced him to confess. Indeed, after the evidentiary hearing, the trial judge found that no such coercion had occurred.

Additionally, the record establishes that since 1980, when Crump became an adult, he has been arrested at least seven times and has been read his rights on each of those occasions. Moreover, this is Crump's second rape and murder of an elderly victim and he admitted receiving his rights on the occasion of his first arrest for rape and murder. Importantly, he testified quite emphatically at the suppression hearing that "he knows his rights". Crump has a long history of involvement with the law and has been read his *Miranda* rights numerous times in the past, indicating that he was fully aware that he had every right to remain silent if he wished to do so. If the police had engaged in coercive tactics by badgering him or by indicating to him that he had no choice but to speak after invoking his right to silence, the failure to "scrupulously honor" that invocation might very well result in an appropriate suppression because the subsequent statement would be coerced. That, however, did not happen here. Never again did Crump express any hesitancy in talking with the police.

As explained in *Elstad*, the purpose of the Fifth Amendment and the requirement that the invocation of the right to silence be "scrupulously honored" is solely to insure that confessions admitted at trial be voluntary. It is not to punish police officers. This Court specifically instructed lower courts to avoid promulgating a "rigid rule" requiring the presence or absence of particular factors in determining if a confession should be admitted.

Rather, courts should look at all of the surrounding circumstances to determine voluntariness. *Elstad*, 470 U.S. at 318. Here, the suppression of the confession does not serve the purposes of the Fifth Amendment because the confession was quite clearly voluntary. At most, it punishes the police officers for not better communicating with each other. The Fifth Amendment does not require this kind of exclusion. As this Court has noted:

> [j]ust as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic.

Michigan v. Tucker, 417 U.S. at 446. Additionally, the public interest is hardly served by having Crump escape trial for murder simply because of this oversight on the part of the police.

The Supreme Court of Tennessee erred in finding that this confession must be suppressed because it violates the "scrupulously honor" requirement in *Michigan v. Mosley* rather than inquiring into whether the confession was voluntary, as set out in *Elstad*.[1] The Tennessee Supreme

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[1] The opinion of the Supreme Court of Tennessee cites the Tennessee Constitution and some Tennessee cases as well as the federal constitution and federal cases in its opinion. However, this Court clearly has jurisdiction over this case under *Michigan v. Long*, 463 U.S. 1032 (1983). In that opinion, this Court

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Court further erred in finding that *Elstad* should be distinguished because, in *Elstad*, no *Miranda* warnings were

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held that where state and federal law is intermingled, there must be language in the opinion to indicate that independent state law controls the court's decision. *Id.* at 1041. Thus, this Court will presume jurisdiction where it is evident that the state court reached its conclusion because it believed it had to under federal law and where there is no statement to the contrary. In this case, the majority opinion of the Supreme Court of Tennessee relied heavily on federal cases, most notably *Miranda, Mosley* and *Elstad* in reaching its decision. The majority cites a total of eleven federal cases and four state cases, presumably to demonstrate that the state courts have followed federal law in the past. The Supreme Court of Tennessee did assert that the state constitutional protections are greater than those found in the federal constitution, Appendix, at 7. However, the court did not give any explanation of the basis for this greater protection. Additionally, the court gave no indication that the greater protection afforded by the Tennessee Constitution commanded the decision reached in this case. Rather, the opinion demonstrates a heavy reliance on federal law and the single statement that the state constitutional protections are greater than those afforded by the federal constitution does not deprive this Court of jurisdiction. A fair reading of the opinion of the Supreme Court of Tennessee indicates that the court felt compelled by the federal constitution as interpreted by *Miranda* and *Mosley* to suppress the confession. Additionally, the dissent clearly interprets the majority's decision as relying on federal law as it discusses federal law only and makes no mention of the Tennessee Constitution. Where there is an intermingling of state and federal law, as here, this Court should presume that the state court based its decision on federal law. *Michigan v. Long, supra,* at 1041. Thus, since nowhere in this opinion did the Supreme Court of Tennessee expressly state that its citation to federal law was for guidance only or that it did not feel compelled to follow federal law, this Court has jurisdiction to review the decision.

given prior to the suspect's first statement. While that is a factual difference between *Elstad* and the situation presented here, the reasoning set out by this Court in *Elstad* is equally applicable to this fact situation. To hold that *Elstad* applies only to a situation where no *Miranda* rights are given but not to this situation creates an extremely anomalous result. Under such a theory, the failure to give *Miranda* warnings does not necessarily result in the suppression of a subsequent voluntary confession because *Miranda* warnings are prophylactic in nature but where the violation is to the prophylactic rule announced in *Mosley*, the courts would be barred as a matter of law from even considering whether the confession is voluntary. Such an application invites a strange result: The *per se* exclusion of a confession for the violation of a prophylactic rule (*Mosley*) upon a prophylactic rule (*Miranda*) but not exclusion for the violation of the first layer of prophylactic rule (*Miranda*). Certainly, such an anomalous result cannot be mandated by the constitution.

The petitioner submits that the only violation in this case was to the prophylactic rule announced in *Mosley*. The Fifth Amendment right to self-incrimination would certainly not be violated by introduction of this voluntary and freely given confession. Crump emphatically testified that he knew his rights and, given his lengthy history of police involvement and the number of times his rights have been read to him, there is no question as to his street savvy. Obviously, Crump knew the consequences of talking to the police but decided to go ahead and speak anyway. This Court should also give consideration to society's interest in the "effective prosecution of criminals". *Michigan v. Tucker*, 417 U.S. at 450. Unquestionably,

the public interest is ill-served by refusing to let a jury hear a defendant confess to the murder of an eighty-six-year-old woman when he voluntarily admitted his guilt. The citizenry is not served by such an exclusion and the constitution does not require it.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff-Appellant, vs. MELVIN CRUMP, Defendant-Appellee.	FOR PUBLICATION Filed: May 18, 1992 DAVIDSON CRIMNAL [sic] HON. WALTER C. KURTZ, JUDGE No. 01-S-01-9011-CR-00098

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OPINION

TRIAL COURT AFFIRMED; COURT OF CRIMINAL APPEALS REVERSED. ANDERSON, J.

In this interlocutory appeal, we are asked to decide whether the defendant's confession was obtained in violation of his rights under the Fifth Amendment of the United States Constitution and Article I, § 9 of the Tennessee Constitution. Specifically, we are concerned with the effect of a police failure to scrupulously honor the defendant's invocation of his *Miranda* right to silence upon the admissibility of the defendant's later confession obtained after a re-warning of his *Miranda* rights. The trial court suppressed the confession; however, the Court

of Criminal Appeals reversed. We disagree and hold the confession is inadmissible for the reasons set forth below.

FACTUAL HISTORY

On September 27, 1988, between Noon and 1:00 p.m., the defendant, Melvin Crump, was arrested at a private Nashville residence. At the time of his arrest, Crump was wanted for escaping from a work detail for the Department of Corrections, where he had been serving time for burglary and second-degree murder. In addition, Crump was wanted as a suspect in the murder of Eliza Mae Smith on August 26, 1988, the day of Crump's escape.

When he was arrested, Crump was handcuffed and placed in the front seat of Sergeant Robert Moore's unmarked police car. While he was sitting in the car, Detective Grady Elam read Crump his *Miranda* rights and asked him if he understood them. Crump acknowledged that he understood his rights and indicated that he did not want an attorney.

Elam then asked, "Having these rights in mind, do you wish to talk to us now?" Regarding Crump's answer, Elam testified:

> I don't remember exactly what he said. It was either, "I don't have anything to say right now," or "I don't have anything to say." I'm not sure exactly what the wording was, but he did not have anything to say to me.

Following Crump's response, Detective Elam terminated his questioning of the defendant and informed him that he was under arrest for escaping from the state penitentiary. Elam also told the defendant that he was a

suspect in the murder of Eliza Smith, a lady who lived down the street from the arrest scene. Crump responded to this information by stating that "I don't know anything about that."

While Detective Elam was occupied with Crump, other officials spent approximately 20 minutes investigating the scene by interviewing neighbors and searching the defendant's room. During the course of this brief investigation, Sergeant Moore approached Detective Elam to inquire whether Crump had been advised of his rights, and Elam responded affirmatively. Although Moore denied asking or being told anything else, Detective Elam testified that he also told Sergeant Moore that Crump said he did not have anything to say.

After the investigation at the scene was concluded, the defendant was transported to the police station by Sergeant Moore and Detective Elam. At some point during the course of their 10-minute trip to the station, Sergeant Moore described to Elam his plan to take Crump on a ride through north Nashville to retrace his escape route, with the hope of "learn[ing] something that deals with the homicide." Moore testified that he asked Crump if he would "mind riding with us back to the scene of where he had escaped," and the defendant "said he didn't have any problem with it."

Upon arriving at the station approximately 30 minutes after giving Crump his first *Miranda* warnings, Detective Elam exited Moore's vehicle and entered the station to begin the paperwork on Crump's arrest. Outside the station, Sergeant Moore met Detectives Mike Smith and Ed Moran, who had participated in the arrest,

and asked them if they would accompany him and Crump on the ride. The detectives agreed and got in the back seat, while Crump rode handcuffed in the front with Sergeant Moore.

The officers began the 30 to 45-minute ride by driving out to the day care center in north Nashville where Crump had escaped from a prison work detail.[1] From there, they proceeded to retrace the defendant's escape route as he described it to the officers. During the course of the trip, Sergeant Moore testified that Crump seemed disinterested and even "nodded off" to sleep at one point.

When Crump's directions took the officers within the vicinity of the Maxwell House Hotel, Sergeant Moore stopped the vehicle and asked Crump if he had stolen anything out of a car in the hotel parking lot. Crump responded by admitting that he had taken items from the car, but said he had later thrown them away. Then Sergeant Moore told Crump that the items stolen from the car were found at the scene of Eliza Smith's murder. Moore testified that after he told him this, Crump just hung his head and it was obvious that an emotional change took place. Moore said that Crump's mannerisms showed him that the officers suddenly had Crump's attention and that Crump knew the police were on to him.

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[1] The defendant testified that the ride lasted 2½ hours and that during this ride, he was taken to a remote location and beaten by all three officers until he agreed to confess. The trial court did not credit his testimony, but we need not address this issue because we hold the defendant's confession inadmissible on other grounds.

Following his incriminating responses, Crump and the officers headed back to the station, where they arrived between 2:00 and 2:30 p.m. When they arrived, Detective Elam noted that although Crump did not show signs of physical abuse, he did show signs of "mental abuse." Detective Elam testified that Crump "looked like he was upset," probably "just the emotion of being arrested."

At the station, Crump was taken to an office and read his *Miranda* rights by Detective Smith.[2] After signing a written waiver of his rights at 2:45 p.m., Crump gave a taped confession of how he strangled Eliza Mae Smith and removed $20 and change from her apartment on the day of his escape. Subsequently, Crump was escorted to booking by Sergeant Moore and thereafter taken before a magistrate at 3:30 p.m.

Following a suppression hearing, the trial court found that the defendant had invoked his constitutional right to remain silent when he told Detective Elam at the arrest scene that he did not have anything to say. The trial court then determined that the admissibility of any statement solicited by subsequent questioning would depend on whether the defendant's invocation of the right to

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[2] During the portion of the warnings pertaining to the right to have counsel present, Crump interrupted Smith with a statement that is inaudible on the tape. Crump argues that he requested counsel at that point, but we need not address this issue because we hold his confession inadmissible on other grounds.

remain silent was "scrupulously honored" under *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

Applying this standard, the trial court found that Crump's right to cut off questioning and remain silent was not "scrupulously honored," and that both the oral statements made during the ride and the taped confession had to be suppressed. The trial court then granted the State's motion for an interlocutory appeal pursuant to Tenn. R. App. P. 9.

The Court of Criminal Appeals reversed the trial court's decision with respect to the taped confession, finding that the determination of whether the police "scrupulously honored" the defendant's invocation of his right to remain silent is only the first prong of a two-prong analysis. The second prong of the analysis, according to the Court of Criminal Appeals, is whether the police violation was of constitutional dimension or merely a violation of *Miranda*'s prophylactic rules under *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

Since the appellate court found that the police misconduct in continuing to question Crump after he invoked his right to remain silent was merely a violation of *Miranda*'s prophylactic rules, the court determined that the only relevant inquiry was whether under *Elstad* the taped confession was given knowingly and voluntarily. Finding that it had been given knowingly and voluntarily following *Miranda* warnings and a signed waiver of rights, the Court of Criminal Appeals held the taped confession admissible.

CONFESSIONS AND SELF-INCRIMINATION RIGHTS

The only issue to be addressed on this interlocutory appeal is whether the defendant's confession should be suppressed because it was obtained in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. The defendant contends that the police conduct in continuing to question him after he invoked his right to remain silent was in violation of his constitutional rights, and therefore, the taped confession should be excluded as an involuntary confession and as tainted "fruit of the poisonous tree." The State, on the other hand, argues that the police misconduct was merely a violation of *Miranda*'s prophylactic rules and that the taped confession should be admissible as a voluntary confession.

The Fifth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. The significant difference between these two provisions is that the test of voluntariness for confessions under Article I, § 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. *See State v. Smith* ___ S.W.2d ___ (Tenn. 1992).

Prior to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the admissibility of an accused's in-custody statements depended on whether they were "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). In *Miranda*, however, the U.S. Supreme Court limited the admissibility of statements that would ordinarily meet the due process test of voluntariness in order to combat the inherently compelling pressures of in-custody interrogation and to permit a full opportunity to exercise the privilege against self-incrimination.

The *Miranda* court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. At a minimum, the Court held that the procedural safeguards must include warnings prior to any custodial questioning that the accused has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to have an attorney present during questioning, whether retained or appointed. *Id.*

Although the court stated that these rights could be waived by an accused if the waiver was made "voluntarily, knowingly, and intelligently," *id.*, the court reiterated that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. To fully honor an accused's self-

incrimination rights, the court stated that "[o]nce warnings have been given, . . . [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At that point, he has shown that he intends to exercise his Fifth Amendment privilege." *Id.* 384 U.S. at 473-74, 86 S. Ct. at 1627, 16 L. Ed. 2d at 723.

Although the court held that interrogation must cease when an accused indicates that he wishes to remain silent, the court did not set forth the circumstances under which the police could resume interrogation without violating an accused's self-incrimination rights. This question, however, was addressed by the court in *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

In *Mosley*, the defendant was arrested as a suspect in a series of robberies and advised of his *Miranda* rights. After stating that he did not want to answer any questions about the robberies, the arresting officer immediately ceased the interrogation and took the defendant to his cell. Approximately two hours later, a different officer re-advised the defendant of his *Miranda* rights and interrogated him about an unrelated homicide. During the course of this interrogation, the defendant made a statement implicating himself in the homicide, which he later challenged on constitutional grounds.

After reviewing the *Miranda* decision, the *Mosley* court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Id.*, 423 U.S. at 104, 96 S. Ct. at 326, 46 L. Ed. 2d at 321.

Under the facts presented, the Court determined that the defendant's right to cut off questioning had been "scrupulously honored" because "the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." *Id.*, 423 U.S. at 106, 96 S. Ct. at 327, 46 L. Ed. 2d at 322. In reaching its conclusion, the *Mosley* court distinguished the facts of its case from a case "where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Id.*, 423 U.S. at 105-06, 96 S. Ct. at 327, 46 L. Ed. 2d at 322.

The facts presented in this appeal clearly demonstrate that Crump's right to cut off questioning by invocation of his right to remain silent was not "scrupulously honored." Thirty minutes after responding to *Miranda* warnings with "I don't have anything to say," he was taken on a 30 to 45-minute drive and questioned while retracing the route of his escape. This clearly constituted, an impermissible resumption of in-custodial interrogative, which caused the admissions made by Crump during the drive to be inadmissible.

The result is not changed by the fact that Sergeant Moore may not have known that the defendant had invoked his right to remain silent after Detective Elam read Crump his *Miranda* rights. *See Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

Neither does the fact that the defendant agreed to accompany the officers on the drive change the result. *Miranda* is clear in its mandate that "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625, 16 L. Ed. 2d at 720.[3]

Having concluded that the police failed to "scrupulously honor" Crump's right to cut off questioning by interrogating him on the drive, we must determine what effect this failure has upon the admissibility of the defendant's subsequent taped confession. As a matter of federal constitutional law, the relevant inquiry is whether the police failure to scrupulously honor the defendant's invocation of his right to remain silent merely violated *Miranda's* procedural rules or violated the defendant's constitutional rights. *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 1290, 84 L. Ed. 2d 222, 230 (1985); *State v. Smith*, ___ S.W.2d ___ (Tenn. 1992). This distinction is crucial under federal law because failure to comply with *Miranda's* procedural guidelines does not result in the same consequences as police infringement of a constitutional right. *Elstad*, 470 U.S. at 304, 105 S. Ct. at 1290, 84, L. Ed. 2d at 229; *Smith*, ___ S.W.2d at ___.

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[3] While a contemporaneous warning is thus absolutely necessary to the subsequent admissibility of a statement, we in no way intimate that police are free to ignore a suspect's invocation of his right to silence so long as they re-administer *Miranda* warnings where this tactic rises to the level of "repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06, 96 S. Ct. at 327, 46 L. Ed. 2d at 322.

Under federal law, if police conduct only results in a violation of Miranda's procedural guidelines, the admissibility of a subsequent confession depends solely on whether it was made knowingly and voluntarily. *Elstad*, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232; *Smith*, ___ S.W.2d at ___. However, if the police conduct results in a federal constitutional violation, the inquiry becomes whether the subsequent confession was involuntary, and whether it was obtained as a result of that violation and therefore must be excluded as tainted "fruit of the poisonous tree." *Elstad*, 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 230; *Smith*, ___ S.W.2d at ___.

After reviewing the record, we conclude that the police failure to scrupulously honor Crump's invocation of his right to remain silent amounted to a violation of the defendant's state and federal constitutional rights. The defendant was read his *Miranda* rights and responded by stating that he "did not have anything to say." This language is sufficient to assert the legal right to remain silent, *O'Brien v. State*, 221 Tenn. (25 McCanless) 346, 350, 426 S.W.2d 507, 508 (1968), and "[a]t this point, he has shown that he intends to exercise his Fifth Amendment privilege." *Miranda*, 384 U.S. at 474, 86 S. Ct. at 1627, 16 L. Ed. 2d at 723. Once an individual invokes his right to remain silent and the police fail to honor that invocation by continuing to interrogate him, that violation, by definition, is on constitutional magnitude. *Hartley v. State*, 103 N.J. 252, 273, 511 A.2d 80, 91 (1986). *See also, Wainwright v. Greenfield*, 474 U.S. 284, 293, 105 S. Ct. 634, 639, 88 L. Ed. 2d 623, 631 (1986) (invocation of the right of silence after *Miranda* warnings is of "constitutional dimension").

The dissent maintains that this case is controlled by *Oregon v. Elstad* and, as a result, the police failure to scrupulously honor the defendant's right to cut off questioning was merely a violation of *Miranda's* procedural rules. *Elstad,* however, addressed the effect of an initial police failure to administer *Miranda* warnings on the admissibility of a defendant's subsequent statements made after being fully advised of, and having waived his *Miranda* rights. *Elstad,* 470 U.S. at 300, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226. Like the Supreme Court of New Jersey, "we perceive a qualitative difference between a failure to administer *Miranda* warnings in the first place, and a failure to honor, after they have been asserted, the constitutional rights those warnings are designed to secure." *State v. Hartley,* 103 N.J. at 272, 511 A.2d at 90.

Moreover, Justice O'Connor, writing for the majority, conceded in *Elstad* "that its new analysis does not apply where the authorities have ignored the accused's actual invocation of his *Miranda* rights to remain silent or consult with counsel." *Elstad,* 470 U.S. at 346, 105 S. Ct. at 1312, 84 L. Ed. 2d at 256, n. 28 (Brennan, J., dissenting). Justice O'Connor specifically found that "inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." *Id.,* 470 U.S. at 313-34, 105 S. Ct. 1295, 84 L. Ed. 2d at 235, n. 3.

The dissent, in essence, argues that it is not a constitutional violation if the police inadvertently, as opposed to deliberately, fail to scrupulously honor an accused's initial invocation of the right to silence. We disagree. If this were the rule, the police could never violate an

accused's constitutional rights as long as one officer gives the *Miranda* warnings, and another officer conducts the interrogation without asking or being told that the accused responded to the warnings by saying either (1) that he does not want to talk to the police, or (2) that he wants an attorney. Adopting the dissent's argument would move the state of criminal law back to the time before *Miranda* when the admissibility of confessions was determined only under the due process test of voluntariness without considering whether "the accused [had been] adequately and effectively apprised of his rights and [whether] the exercise of those rights [had been] fully honored." *Miranda,* 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. Such a step back in legal time is totally unacceptable.

Having found that the police violated the defendant's state and federal constitutional rights, we must now determine whether the subsequent taped confession was involuntary, and whether it must be excluded as the tainted "fruit" of the constitutional violation. *Elstad,* 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 230; *Smith,* ___ S.W.2d at ___. Our review of the record convinces us that, as a matter of state and federal constitutional law, the taped confession was both involuntary and tainted by the prior constitutional violation.

In determining whether a subsequent confession was made knowingly and voluntarily, courts must examine the totality of the circumstances. *Elstad,* 470 U.S. at 318, 105 S. Ct. at 1298, 84 L. Ed. 2d at 238; *State v. Kelly,* 603 S.W.2d 726, 728-29 (Tenn. 1980). The question in each case is whether the conduct of the law enforcement officers

was such to undermine the accused's free will and critically impair his capacity for self-determination so as to bring about an involuntary confession, *Columbe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037, 1057-58 (1961); *Kelly*, 603 S.W.2d at 728.

Guided by the voluntariness factors set forth in *State v. Smith*, ___ S.W.2d at ___, we find that the police conduct in this case undermined Crump's free will and brought about an involuntary confession. The confession immediately followed the 30 to 45-minute drive, where the police questioned and obtained incriminating statements from the defendant in violation of his constitutional rights. As a result, at the time of his confession, the defendant was still laboring under the psychological impact of having already confessed and "let the cat out of the bag" during the drive.

Sergeant Moore testified that it was obvious an emotional change took place in Crump when he learned that the police were on to him and made incriminating statements. Upon making the admissions, Crump was immediately returned to the station, where Detective Elam observed he showed signs of mental abuse. After his return to the station, Crump was immediately taken to an office, where he promptly confessed after he was given *Miranda* warnings.

Under these circumstances, we find that Crump's taped confession was involuntary. Although we realize that having already "let the cat out of the bag" does not automatically vitiate voluntariness, *see Smith*, ___ S.W.2d at ___, we hold that there was not a sufficient break in the

stream of events between the first inadmissible statements and the subsequent confession such that the subsequent confession may be fairly said to have resulted from an independent and voluntary act of free will, rather than a continuous chain of events initiated by the improper questioning. *See Clewis v. Texas*, 386 U.S. 707, 710, 87 S. Ct. 1338, 1340, 18 L. Ed. 2d 423, 427 (1967); *Westover v. United States*, 384 U.S. 436, 494-97, 86 S. Ct. 1602, 1638-39, 16 L. Ed. 2d 694, 735-36 (1966). Therefore, we hold that the prosecution failed to successfully rebut the presumption that the illegally-obtained, initial statements given on the drive also tainted the subsequent confession given by Crump. *State v. Smith, supra,* ___ S.W.2d at ___.

In addition to holding Crump's confession involuntary, we also hold that it was obtained as a result of the prior constitutional violation and, therefore, must be excluded as the "fruit of the poisonous tree." The factors to examined in determining whether a confession has been purged of the taint of a prior constitutional violation include: (1) the giving of proper *Miranda* warnings; (2) the temporal proximity of the police misconduct and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 442 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62, 45 L. Ed. 2d 416, 427 (1975); *State v. Chandler*, 547 S.W.2d 918, 920 (Tenn. 1977).

Although the officers did administer *Miranda* warnings before obtaining the taped confession, there were no intervening circumstances. In addition, the temporal proximity of the police misconduct to the confession was too short to purge the confession of the taint of the prior

constitutional violation. Therefore, we find that the taped confession is inadmissible "fruit of the poisonous tree."

CONCLUSION

Accordingly, we hold that the taped confession is inadmissible in the State's case-in-chief against the defendant because it was not voluntary, and because it is tainted by the violation of the defendant's state and federal constitutional rights. We reverse the decision of the Court of Criminal Appeals and affirm the trial court's judgment. This case is remanded to the trial court for a trial upon the merits. The costs of this appeal are taxed to the State of Tennessee.

/s/ E. Riley Anderson
E. RILEY ANDERSON, Justice

Reid, C.J., and Daughtrey, J., Concurring
Drowota and O'Brien, JJ., Dissenting

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff-Appellee, V. MELVIN CRUMP, Defendant-Appellant.	FOR PUBLICATION DAVIDSON CRIMINAL Hon. Walter C. Kurtz, Judge. S.C No. 01-S-01-9011-CR-00098

DISSENT

(Filed May 18, 1992)

I agree that Defendant's invocation of his right to remain silent was not scrupulously honored. However, because the record does not establish that the officers used "deliberately coercive or improper tactics in obtaining the initial statement," *see Oregon v. Elstad*, 470 U.S. 298, 314, 105 S. Ct. 1285, 1296, 84 L. Ed.2d 222 (1985), I would hold that the police failure to scrupulously honor Defendant's initial invocation of *Miranda* silence did not rise to the level of a constitutional violation. Therefore, the admissibility of Defendant's later confession should be determined by examining whether it was made voluntarily.

The Fifth Amendment to the United States Constitution and Article I, Section 9, of the Tennessee Constitution prohibit compulsory self-incrimination. Actual compulsory self-incrimination, for example, torture or repeated efforts to wear down a defendant's resistance, directly violates these constitutional provisions.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), the United States Supreme Court promulgated safeguards to combat the compulsion presumed to be present in all custodial interrogations. Statements obtained in violation of these procedural safeguards are excluded because the procedural violation creates a presumption of compulsion. Violation of the *Miranda* safeguards does not, however, necessarily mandate the finding of a constitutional violation. *See Elstad*, 470 U.S. at 307, 105 S. Ct. at 1292 ("Miranda . . . provides a remedy even to the defendant who has suffered no identifiable constitutional harm").

Here, Defendant invoked his right to remain silent. The officers then violated *Miranda* when they asked Defendant if he would "mind riding with [them] back to the scene of where he had escaped." Because the officers did not scrupulously honor Defendant's invocation, the resulting statements were properly excluded according to the dictates of *Miranda*. However, while this violation resulted in a presumption of compulsion under *Miranda*, it did not rise to the level of actual compelled self-incrimination so as to constitute a constitutional violation: Defendant was not forced to accompany the officers, nor was he subject to torture or repeated efforts to wear down his resistance.

Because there was no constitutional violation, the Defendant's subsequent taped confession is not to be evaluated in terms of whether it is inadmissible "fruit of the poisonous tree." Rather, the confession is admissible if, after examining the totality of the circumstances surrounding the entire course of police conduct, the confession is found to have been voluntarily made. I would so

find, and affirm the Court of Criminal Appeal's holding that the Defendant, after being given a second *Miranda* warning, validly waived his right to remain silent and that therefore the subsequent confession was admissible. "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Elstad*, 470 U.S. at 312, 105 S. Ct. at 1294-95. The taped confession should be admitted in the State's case in chief against the Defendant.

I am authorized to state that Justice O'Brien concurs in this dissenting opinion.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
JUSTICE

(2)

92-222

No. _____

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Tennessee

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX A

MINUTES, MAY TERM, 1ST DAY OF JUNE, 1989

MINUTE BOOK 31, PAGE 755

STATE OF TENNESSEE, PLAINTIFF, VS. MELVIN CRUMP, DEFENDANT.	MOTION TO SUPPRESS STATEMENTS 88-F-2144 88-F-2146 ORDER GRANTING MOTION TO SUPPRESS STATEMENTS. STATE GRANTED LEAVE TO FILE INTERLOCUTORY APPL.

ORDER ON MOTION TO SUPPRESS STATEMENTS

For the reasons stated in the Court's Memorandum Opinion dated May 25, 1989, defendant's Motion to Suppress Statements is hereby GRANTED, and the evidence of oral and tape recorded statements is hereby excluded from evidence pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and progeny. For the reasons further stated in the said Memorandum, the State is granted leave to file an interlocutory appeal for the reasons expressed in Rule

9(a)(1) and (3) and according to the terms described in said Memorandum.

This the 1 day of June, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

APPROVED FOR ENTRY:

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Ordered that Court stand adjourned until morning at nine o'clock.

/s/ WALTER C. KURTZ JUDGE

SUPPLEMENTAL APPENDIX B

IN THE FIFTH CIRCUIT COURT
FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE	)	NO. 88-F-2146
VS.	)	88-F-2144
MELVIN CRUMP	)	
	)	(Filed May 25, 1989)

MEMORANDUM

This defendant is charged in case 88-F-2146 with one count of first degree murder and one count of armed robbery. In a second indictment, 88-F-2144, he is charged with escape from the Department of Correction.

The defendant has filed a motion to suppress certain oral and tape recorded statements made by the defendant subsequent to his arrest on these charges. The defendant alleges a violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He further alleges a violation of the due process provisions of both the state and federal constitutions in that he contends the statements were taken from him as a result of threats and physical assaults by law enforcement officers. *See Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936).

The Court heard evidence on these motions on May 3, 1989, and again on May 5, 1989, and the matter was taken under advisement. Defense counsel have filed extensive briefs in support of their positions. The State declined to file a brief in support of its position, but cited the court to several cases.

The Court heard proof from a number of police officers, several civilian witnesses, and heard the testimony of the defendant.

The Court will attempt to set forth its findings of fact as succinctly as possible. The defendant was arrested on September 27, 1988, at a private residence here in Davidson County some time between noon and 1:00 P.M. Participating in the arrest were a number of detectives; Sergeant Robert Moore, Detective Grady Elam, Detective Mike Smith, Detective Ed Moran, Detective Terry McElroy, and several uniformed patrol officers. Upon being arrested, the defendant was placed in a police automobile and Detective Grady Elam proceeded to inform the defendant of his *Miranda* rights. Using a *Miranda* card (Exhibit 4), which he carried with him, he stated as follows:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish one.

5. You have the right to stop answering questions at any time.

Detective Elam then turned the card over and read the waiver questions from the back of the card. He first asked the defendant if he understood his rights. The defendant responded in the affirmative. The defendant

was then asked if he wanted a lawyer. The defendant responded in the negative. Then Detective Elam said, "having these rights in mind, do you wish to talk to us now?" The following testimony from Detective Elam describes the answer.

> And I don't remember exactly what he said, it was either I don't have anything to say right now, or I don't have anything to say. I'm not exactly sure what the wording was, but he didn't have anything to say to me.

Having received this answer, Detective Elam asked no further questions, but did tell the defendant that they were investigating a murder. The defendant responded that he didn't have anything to do with any murder. Detective Elam made no further comments.

Another officer returned from the apartment where the defendant was arrested and asked Detective Elam if the defendant had been given his *Miranda* rights. Elam responded that he had, but did not tell this other officer, Sergeant Robert Moore, that the defendant did not want to make a statement. Moore and Elam got in the car with the defendant and drove him to police headquarters. Upon reaching police headquarters, Moore decided that he would question the defendant; and that instead of booking the defendant and taking him before a magistrate, he would drive the defendant to several locations related to the investigation of the murder. Moore asked the defendant if he would accompany him in his automobile and the defendant said yes. Although the defendant had been brought to police headquarters, he was not removed from the police automobile. Moore and two

other detectives got in the automobile with the defendant, left police headquarters, and went to several locations related to the investigation of the murder. Sergeant Moore took the defendant for a ride in order to elicit incriminating statements from the defendant. This is interrogation. *See Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 1689-90 (1980).

Detective Mike Smith, who was also in the automobile, did most of the talking because he had good "rapport" with the defendant. Smith had also been one of the arresting officers. During this ride, the defendant was asked questions regarding certain events related to his escape and the murder. The defendant responded with answers that were inculpatory.

It was during this ride that the defendant claims that he was taken to a remote location in Davidson County and beaten by all three officers. The Court finds no validity to the defendant's claim that he was threatened and beaten. His testimony is not credible, and the Court credits the testimony of the officers that the defendant was not threatened and beaten.

The ride in the police car lasted about forty-five minutes. The defendant was then returned to police headquarters for further questioning. He was taken to an office, and with Detective Elam and Detective Smith, was for the second time given his *Miranda* warnings. At approximately 2:45 P.M., the defendant was read his *Miranda* rights by Detective Smith and signed a written waiver (Exhibit 1). The written waiver was read to the defendant before he signed it. The defendant was asked "what level of education do you have," and he responded

"none." Even though the defendant testified at the evidentiary hearing, the State never pursued the question of his education, and the Court concludes that the defendant is a person of very limited education.

During the reading of the waiver, the defendant attempted to make a comment. The defense insists that this was an attempt by the defendant to invoke his right to an attorney, and that the defendant stated "I want one now." The State, on the other hand, contends that the defendant said "I don't want none." The Court has listened several times to the tape of this conversation (Exhibit 3), and concludes that it cannot be determined from the tape what was said by the defendant. However, this Court credits the testimony of Detective Elam that the defendant responded by saying "I don't want none." This is further corroborated by the defendant's subsequent actions. The court finds that the defendant did not request counsel.

The defendant made a statement which was tape recorded and transcribed (Transcript-Exhibit 2). The defendant was then taken before a magistrate some time between 3:30 P.M. and 4:00 P.M.

The Supreme Court held in *Miranda* that the police must follow certain guidelines when conducting custodial interrogations in order to protect the constitutional rights of the suspect. Under *Miranda* the police must not only give the suspect a familiar set of warnings, but they also must "scrupulous [sic] honor" the suspect's right to cut off questioning. As the *Miranda* court emphasized "if the individual indicates in any manner at any time prior to or

during questioning that he wishes to remain silent, the interrogation must cease." *Miranda supra* at 1627.

In this case, the defendant did invoke his right to remain silent. A prior Tennessee case holds that almost identical language invokes the right to remain silent. *See O'Brien v. State*, 221 Tenn. 346, 426 S.W.2d 507, 508 (1968) ("I have nothing to say at this time"). *See also Christopher v. Florida*, 824 F.2d 836, 841-42 (11th Cir. 1987) *cert. denied* 108 S.Ct. 1057 ("I got nothing else to say" is unequivocal); *State v. Klimczak*, 268 A.2d 372 (Conn. 1970) ("don't bother me" indicates assertion of right to remain silent); *People v. Carey*, 227 Cal.Rptr. 813, 814-15, 183 Cal. App. 3d, 99 (2d Dist. 1986) (suspect's statement "I ain't got nothing to say" was an invocation of right to remain silent).

In *Michigan v. Mosely*, 423 U.S. 96, 96 S.Ct. 321 (1975), the Supreme Court explored in greater detail the scope of the suspect's right to cut off questioning:

> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored. . . . " 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474, 86 S.Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of

> the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

Id. at 326.

In *Mosely* the Supreme Court decided that while there was no absolute bar against subsequent questioning of the suspect who had invoked the right to remain silent, the admissibility of any statement solicited by subsequent questioning depends upon whether the invocation of the right to remain silent was "scrupulously honored." *Id.* at 326. The facts in *Mosely* supported the conclusion that defendant's right had been scrupulously honored: the police ceased the initial interrogation, resumed questioning only after a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the earlier interrogation, i.e., one that Mosely had not previously declined to discuss. *Id.* at 327-28.

Applying the principles of *Miranda* and *Mosely* to the facts of the instant case, the Court must conclude that Crump's right to cut off questioning was not "scrupulously honored" during his interrogation on September 27, 1988. The defendant having invoked his right to remain silent, was transported to police headquarters; yet, within twenty minutes, he was taken away in a police car with three other officers and questioned during a forty-five minute automobile ride. Then returning to police headquarters he was given *Miranda* warnings and,

subsequently, made a taped statement. The taped statement merely followed the subject matter of the statements previously made by the defendant during his automobile ride. This is not the "scrupulously honored" provision envisioned by the Supreme Court in *Miranda* and *Mosely*.

The State can make several arguments in an effort to provide for the admissibility of the taped statement taken at police headquarters. The State might argue that although the defendant did invoke his right to remain silent, he subsequently made "voluntary" statements in response to police interrogation. This argument is appropriately refuted by the following passage from a decision of the United States Court of Appeals for the Eleventh Circuit:

> The state . . . argues that we should affirm the district court's determination that Christopher did not adequately assert his right because he "voluntarily" continued the interrogation. 582 F.Supp. at 644.
>
> The state cannot prevail in this argument, however. Contrary to the district court's holding, a suspect's claim that the police violated his right to silence by failing to immediately terminate the interrogation, is not negated by the fact that the suspect answered additional questions after the police failed to scrupulously honor his request to end questioning. *See Martin*, 770 F.2d at 923-24; *Hernandez* 574 F.2d at 1369. "[A]n accused's post-request response to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490,

> 495, 83 L.Ed.2d 488 (1984). The fact that Christopher continued to speak, therefore, has no bearing on his claim that he invoked, and the police failed to honor, his right to remain silent.

Christopher v. Florida, 824 F.2d 836, 841 (11th Cir. 1987), cert. denied 108 S.Ct. 1057.

The State may further argue that the giving of a second set of *Miranda* warnings, and the defendant's waiver of his rights, would allow for the admissibility of the second statement given at police headquarters. In a lengthy decision involving facts remarkably similar to the facts in this case, the Supreme Court of New Jersey in the case of *State v. Hartley*, 511 A.2d 80 (N.J., 1986) thoughtfully analyzed all the authorities and principles governing this issue. The New Jersey Court concluded that the police having failed to have "scrupulously honored" the defendant's right to remain silent, a second confession must be suppressed; even though *Miranda* warnings were given. In reaching this Court's conclusion in this case, it relies heavily on the reasoning of and the authorities cited in the *Hartley* case.[1]

Defendant Hartley was arrested for murder and was given *Miranda* warnings in response to which he asserted his right to remain silent. Subsequently, he was questioned by F.B.I. agents but not given *Miranda* warnings. In response to questioning by the F.B.I. agents, the defendant made certain inculpatory statements. Almost immediately after making the statements to the F.B.I. agents,

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[1] Of special interest is the analysis of the inapplicability of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285 (1985). *Hartley, supra*, at 91-93.

the defendant was questioned by state authorities who did give him *Miranda* warnings. The defendant repeated the statement which he had given to the F.B.I. agents. The Court concluded as follows:

> . . . we determine that a police failure scrupulously to honor an accused's earlier invoked right to silence amounts to a violation not simply of *Miranda's* prophylactic rules but of the accused's privilege against self-incrimination. Therefore, any statement that a suspect may make after his right to silence has not been scrupulously honored is unconstitutionally compelled as a matter of law. That circumstance in turn requires a close examination of the relationship between the first statement and any subsequent statement.
>
> We conclude that in this case the federal authorities' failure scrupulously to honor defendant's announced intention not to make a statement requires the exclusion, on the State's case, not only of the defendant's confession to agents of the Federal Bureau of Investigation (FBI) but also of defendant's second statement, made to state and municipal authorities. This result is compelled either (1) because the second statement was obtained through a process that was in fact part of the same illicit procedure that produced the first statement, or (2) because it was the product of an unconstitutional interrogation – and this despite the readministering of *Miranda* warnings to defendant before the second statement. Finally, we base the above determinations not only on our understanding of the United States Supreme Court precedents in this area but on independent state grounds of decision as well.

Id. at 82.

The critical factor in this case is that the police did not "scrupulously honor" the defendant's invocation of his right to remain silent. If the police had "scrupulously honored" the defendant's right to remain silent, then after the passage of the significant period of time, they could have interrogated him after a renewed *Miranda* warning and waiver. *See, e.g., Jackson v. Dugger,* 837 F.2d 1469 (11th Cir. 1988); *See generally* Lafave & Israel, *Criminal Procedure,* § 6.9 (g) (1984). In this case, however, the police did not "scrupulously honor" the defendant's right to remain silent, but continued to question the defendant. Therefore, the statements taken must be suppressed.

Does it make any difference that Sergeant Moore, who questioned the defendant during the automobile ride may not have known that the defendant invoked his right to remain silent? The Court believes that it makes no difference. The Supreme Court has dealt with this issue in the analogous situation where a defendant invokes his right to an attorney after receiving *Miranda* warnings. In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court held that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel had been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police. In a subsequent case, *Arizona v. Roberson,* 486 U.S. ___, 108 S.Ct. 2093 (1988), the State attempted to distinguish *Edwards* by arguing that a second officer who interrogated *Roberson* did not know that *Roberson* had invoked his right to counsel. The Court responded as follows:

> Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that *Edwards* focused on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. In this case respondent's request had been properly memorialized in a written report but the officer who conducted the interrogation simply failed to examine that report. Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second interrogation, the same need to determine whether the suspect has requested counsel exist. The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer. *Cf., Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

Id. at 2101. No less can be said for this situation. Even though Detective Elam may not have told Sergeant Moore that the defendant had invoked his right to remain silent, the State cannot rely on that fact to circumvent the holding of *Miranda.*

This Court concludes as follows:

1. The defendant invoked his right to remain silent and for reasons expressed above, as well as in the case of *State v. Hartley, supra,* both the oral statement in the

automobile and the taped statement at police headquarters must be suppressed.

2. The defendant did not request an attorney.

3. The defendant was not threatened or beaten and, therefore his statements were not taken in violation of due process principles of the federal or state constitutions.

Mr. Carey will please draw the appropriate order granting the motion to suppress for the reasons expressed in this memorandum.

Suppression of this evidence will substantially impair the State from prosecuting this case, therefore, pursuant to Rule 9 TRAP, the State is granted an interlocutory appeal for the reasons expressed in Rule 9(a)(1) and (3). If the State's attorney desires to appeal, he should submit

an order for signature within ten (10) days of this Court signing the order submitted by Mr. Carey.

This the 25 day of May, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

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SUPPLEMENTAL APPENDIX C

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE MINUTES, MAY TERM, 12TH DAY OF JULY, 1989
MINUTE BOOK 32, PAGE 368

WEDNESDAY, JULY 12, 1989

Court met pursuant to adjournment, present and presiding the Honorable Walter C. Kurtz, Judge of the Fifth Circuit Court of Davidson County, Tennessee, when the following proceedings were had, to-wit:

STATE OF TENNESSEE VS. MELVIN CRUMP	MOTION TO SUPPRESS STATEMENTS 88-F-2144 88-F-2146 ORDER RE: MOTION TO RECONSIDER FACTUAL FINDINGS.

ORDER

This cause came on to be heard before the Honorable Walter C. Kurtz, Judge, upon the motion to reconsider factual findings as set forth in its Memorandum Opinion of May 25, 1989. After due consideration and stipulation by counsel for the defendant, the Court is of the opinion that "nine" years of education shall be substituted in the record as the defendant's educational level rather than "none".

It is therefore ORDERED that "nine" shall be substituted in the record for "none" as it refers to the defendant's educational level.

Entered this 12 day of July, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

APPROVED FOR ENTRY:
/s/ Floyd N. Price
Floyd N. Price
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Reg. No. 6475

Ordered that Court stand adjourned until morning at nine o'clock.

/s/ WALTER C. KURTZ, JUDGE

SUPPLEMENTAL APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

SEPTEMBER SESSION, 1989

STATE OF TENNESSEE APPELLANT	NO. 89-194-III DAVIDSON COUNTY
V.	HON. WALTER C. KURTZ, JUDGE
MELVIN CRUMP APPELLEE	(Grant of Motion to Suppress) (Filed Apr. 25, 1990)

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REVERSED AND REMANDED
OPINION FILED: APR 25 1990
JERRY SCOTT, JUDGE

OPINION

This is an interlocutory appeal by the state pursuant to Rule 9, T.R.A.P., by which the state has appealed the order of the trial court suppressing the appellant's confession.

On September 27, 1988, the appellant was arrested for escape from the Tennessee State Penitentiary where he was serving time for murder. At the time of his arrest he was also a suspect in the murder and rape of an elderly woman. The arrest occurred between 10:00 A.M. and 1:00 P.M., at 1190 Eleventh Avenue South in Nashville, after the police received a tip as to where he was staying. After he was arrested he was placed in the front seat of a police car. Grady Elam, a detective with the Metropolitan Police Department, advised him of his rights. The appellant responded that he understood his rights and did not want an attorney. When asked whether he wanted to make a statement, the appellant said either "I don't have anything to say" or "I don't have anything to say right now." Mr. Elam asked the appellant no questions, but did tell him that they were investigating the murder and the appellant said, "I don't know anything about that."

The officers took the appellant to the police headquarters where Mr. Elam went inside to do the paperwork concerning the appellant's apprehension. Robert Moore of the Metropolitan Police Department had been present at the time of the appellant's apprehension. After

they arrived at headquarters, he decided to take the appellant back to the scene where he was apprehended, which was one to one and half blocks from the murder scene. The purpose of this trip was to try to get the appellant to give a statement regarding the murder. He asked the appellant if "he would ride the escape route with him," and the appellant agreed to do so. Two detectives and a Mr. Moran got in the car with the appellant and Mr. Moore and rode with them.[1] Mr. Moore heard Mr. Elam advise the appellant of his rights, but he did not know that the appellant had invoked his rights. No force or coercion was used against the appellant during the ride and the appellant even "nodded off" to sleep as they rode. According to Sergeant Moore, the appellant was not under the influence of drugs, but just appeared disinterested. The trip took approximately thirty minutes, and Mr. Smith asked most of the questions in the car.

They first drove to the day care center where the appellant had escaped from a painting detail. The appellant then retraced his escape route from the work detail. They stopped at the Maxwell House Hotel and he was asked if he had taken anything out of a car at the hotel. He admitted taking items from the car but said he had thrown them away. Mr. Moore told him that the items from the car were found in the murder victim's home, but the appellant made no response to that statement.

The appellant testified that during this riding around he was taken to a remote location where the police beat

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[1] While Mr. Moran testified, he was referred to throughout the record as "Officer Moran" and his given name does not appear.

him until he confessed. The trial judge found no validity to that claim and there were witnesses who saw him soon after his return to custody, who testified that, in spite of his statement that he'd been beaten, they found no evidence that his allegation was true.

At the conclusion of the riding around they returned to the police headquarters were the appellant was taken to an office for questioning. The questioning was tape recorded, beginning at 2:40 P.M. Mr. Smith gave the appellant his *Miranda* warnings. The appellant interrupted during the *Miranda* warning, but, according to Mr. Smith, the interruption had nothing to do with the warning. The interruption was not transcribed and Mr. Smith could not remember exactly what the appellant said. After being advised of his right to an attorney, the appellant interrupted and, according to Mr. Smith, said, "I don't want nairen." Mr. Smith testified that the word "nairen" is a southern slang term for "none." The appellant testified that what he said on the tape was, "I want one now." The judge found that it was impossible to discern from the garbled statement on the tape what was actually said, but he accredited Mr. Elam's statement that the appellant said he didn't want "nairen."[2]

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[2] We have listened intently to the tape and we agree with the trial judge that it is difficult to hear exactly what the appellant said. From our examination, we believe Mr. Elam was correct when he testified the appellant said he didn't want "nairen." That term is defined as "never a one," Halliwell-Phillips, et al., *Dictionary of Archaic and Provincial Words*, (1847), or as "nothing," Wright, ed., *The English Dialect Dictionary* (1898).

The appellant testified that he had been arrested more than seven times since 1980, that his rights had been read to him on more than seven occasions, and that he knew his rights.

After the *Miranda* warnings, the appellant read and signed a waiver of his rights, then gave a full confession, which was tape recorded.[3]

The appellant moved that his confessions be suppressed, both his statements in the car and his tape recorded statement. The state conceded that it would not attempt to introduce the statements given in the car, but argued that the tape recorded statement should be admitted, since he was given fresh *Miranda* warnings. The trial court ordered that the taped statement also be suppressed. In so doing, the trial judge filed an excellent memorandum of law, setting forth his reasoning and the cases from the United States Supreme Court and other courts upon which he relied.

In determining whether the tape recorded confession was properly suppressed, we must engage in a two prong analysis. First, it must be determined whether the police "scrupulously honored" the appellant's invocation of his

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[3] The trial judge first found that when asked what level of education he had, the appellant replied "none." Actually, he replied "ninth," obviously referring to the ninth grade and the trial judge filed an order correcting that error. The trial judge found that the appellant is a person "of very limited education." We disagree. It is clear from the record, including the appellant's testimony at the hearing on the motion, that the appellant is very street-wise and understands the legal system quite well, including the *Miranda* warnings and their meaning.

right to remain silent. If a violation is found, the second prong of the analysis requires that we determine whether the violation was of constitutional dimension or merely a violation of the prophylactic rules set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If the violation was merely one of a prophylactic rule, it was cured by the second *Miranda* warning and the issue must be whether the statement was voluntary. In *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S.Ct. 1285, 1293, 84 L.Ed.2d 222 (1985), the Supreme Court noted that errors by law enforcement officers in administering the prophylactic *Miranda* procedures "should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself," and a simple failure to follow *Miranda*, "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" will not so taint the investigatory process that a subsequent voluntary and informed waiver will be ineffective for some indeterminate period. The admissibility of any subsequent statement should turn "solely on whether it is knowingly and voluntarily made." One court has noted that a second statement coming "on the heels of – if not in tandom with – the first, unconstitutionally obtained, compelled statement was unavoidably tainted" and "chameleon-like retains the coloration of the first as a matter of law." *State v. Hartley*, 103 N.J. 252, 511 A.2d 80, 97 (1986).[4]

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[4] This is the case upon which the trial court relied in excluding the taped confession. The holding was subsequently limited to its facts and deemed not applicable when the defendant reinitiates communication with the police. *State v. Fuller*, 231 N.J. Super 66, 554 A2d 1364, 1367 (1989).

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Through the Fourteenth Amendment this provision is applicable to the states. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 1492, 12 L.Ed. 653 (1964).

In the famous case of *Miranda v. Arizona*, supra, the United States Supreme Court set forth the warnings that must be given before interrogation of one who is in custody. Once the warnings are given, an indication by the suspect that he wishes to remain silent stops the interrogation. Of course, the word "interrogation" refers not only to express questioning, but also to "any words or actions on the part of the police" that the officers should know are "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297 (1980).

Of course, it is clear from the facts of this case that Sergeant Moore anticipated that the riding around would elicit a confession. He candidly testified that was his purpose for the trip, and he obviously initiated it when he asked the appellant if he would accompany them.

In *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975), the Supreme Court set forth the test to determine whether statements taken after the invocation of the right to remain silent are admissible. Admissibility depends on whether the suspect's "right to cut off questioning" was "scrupulously honored." In *Mosley*, the defendant was advised of his rights and he invoked his right to remain silent. Two hours later, he was questioned by different officers at another location

about a different crime after again being fully advised of his *Miranda* rights. *Id.*, 96 S.Ct. at 327.

The Supreme Court found that his rights were scrupulously honored, noting that the officers immediately ceased the interrogation after the rights were invoked, questioning was resumed only after a significant amount of time had passed, Mr. Mosley was readvised of his *Miranda* rights and the second interrogation was restricted to a different crime. *Id.*, 96 S.Ct. at 327. Whether all of the factors cited by the Supreme Court in *Mosley* are required in every case has been an issue debated in the courts. *See*, e.g.: *State v. Hartley*, supra (minimum requirement is furnishing fresh *Miranda* warnings before resuming custodial interrogation); *United States v. Terry*, 702 F.2d 299, 317-318 (2d Cir. 1983) (forty minute recess, fresh *Miranda* warnings and a scrupulous respect for defendant's right made noncoerced statement admissible); and *United States v. Maddox*, 413 F.Supp. 60, 65-66 (W.D. Okla. 1976) (statement inadmissible where the police reinterrogated about the same offense).

It is clear that the police did not scrupulously honor the appellant's right to remain silent during the riding around interrogation. Sergeant Moore knew that the appellant had been advised of his rights, but did not attempt to learn whether he had invoked his rights. (He testified he heard Mr. Elam read the appellant his rights, but did not testify concerning whether he heard the appellant's response). The purpose of the trip was to get a confession and none of the safeguards set forth in *Mosley* were present.

It is clear that the statements made in the car were inadmissible and the state is not seeking their admission. However, the events in the car must be considered in determining the admissibility of the taped statement. It is worthy of note that the trial judge did not believe the defendant's statements that he was beaten, and there is no indication that there was any coercion either to get the appellant to ride with the officers or during the ride.

In *Michigan v. Tucker*, 417 U.S. 433, 434, 94 S.Ct. 2357, 2564, 41 L.Ed.2d 82 (1974), the Supreme Court found that the *Miranda* warnings are prophylactic rules not constitutional requirements.[5] In *Oregon v. Elstad*, 470 U.S. 290, 105 S.Ct. 1285, 1296, 84 L.Ed.2d 222 (1985), the Supreme Court held that "(a) subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement," since the fact finder may reasonably conclude that he made a "rational and intelligent choice whether to waive or invoke his rights." The United State Supreme Court has not dealt directly with the issue of whether the *Elstad* rule would apply to a situation where the defendant was previously warned, invoked his right to silence, but the officers ignored the invocation. In *Elstad*, the Supreme Court made it clear that *the* question in cases concerning admissibility where the Fifth Amendment

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[5] *Tucker* involved pre-*Miranda* questioning in which the officers failed to advise the defendant of his right to appointed counsel "free of charge" if he could not afford to retain counsel. (His trial occurred after *Miranda*.) 94 S.Ct. at 2360.

right to silence is involved is whether the confession is free and voluntary.

In *Elstad*, the defendant made incriminating statements at the scene of the arrest as a result of interrogation, but prior to any *Miranda* warnings being given. Subsequently, the defendant was given his warnings at police headquarters and then made a full confession. *Id.*, 105 S.Ct. at 1289-1290. In that case the court held that the proscription against compelled testimony is "fully satisfied" by barring the use of the unwarned statement. 105 S.Ct. at 1298. The court concluded that no further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. The court noted that the fact that "a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Id.*, 105 S.Ct. at 1298.

Thus, the question in this case is whether the tape recorded confession was voluntarily given or whether it was the product of coercion. Frankly, it doesn't even appear that the statement given in the car was the product of any coercion. That statement was, in our opinion, also voluntary, but was given after the appellant stated he invoked his right to remain silent.[6]

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[6] As Justice O'Connor observed in *Elstad*, "(w)hen neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." 105 S.Ct. at 1295.

The trial court relied on *State v. Hartley,* supra, and *Christopher v. Florida,* 824 F.2d 836 841 (11th Cir. 1987).[7] Of course, those cases are persuasive authority only and are not binding on this Court.

In this case it is clear that the statements given at the tape recorded interview were entirely voluntary. The officers described the relatively comfortable setting in which the statement was given in an office at the police headquarters. The tape recording reveals the giving of the *Miranda* warnings, the appellant's response thereto and the extensive and detailed confession that he gave after being warned. While not a high school graduate, the defendant is anything but illiterate. He had a prior murder case in 1983 and testified that since 1980, when he became an adult, he has been arrested more than seven times and that on every occasion he has been read his rights. He testified emphatically that "he knows his rights." Thus, in a nutshell, it is clear that the appellant, fully cognizant of his right to speak or remain silent, chose, after the second *Miranda* warning, to give a detailed confession. To find this knowledgeable appellant's confession must be suppressed due to the failure of the officers to honor his prior decision to remain silent would effectively allow him to cleverly work the system to his advantage. As the Supreme Court noted long ago in a Sixth Amendment right to counsel case, the determination of whether there has been an intelligent waiver must

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[7] *Christopher* is distinguishable from this case in that it involved one extended period of questioning in which his unequivocal assertion of his right to remain silent was ignored. 824 F.2d 840.

depend upon the particular facts and circumstances surrounding that case, including the "background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 146 (1938).

In *Oregon v. Elstad,* supra, 105 S.Ct. at 1298, the United States Supreme Court noted that "(a) handful of courts have, . . . applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda* was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made." To make that determination, courts must look to "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."

From all of the circumstances, including the appellant's own testimony, it is clear that the second statement, given after proper *Miranda* warnings and a waiver of rights by the appellant, was entirely voluntary. The judgment suppressing the statement is reversed and this

cause is remanded to the trial court for further proceedings.

/s/ Jerry Scott
JERRY SCOTT JUDGE

CONCUR:

(Not participating)
MARTHA CRAIG DAUGHTREY, JUDGE

/s/ Adolpho A. Birch, Jr.
ADOLPHO A. BIRCH, JR., JUDGE

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

(3)

No. 92-222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent

Petition for Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

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40pp

QUESTION PRESENTED

Whether the Fifth Amendment and/or the Tennessee Constitution, Article I, Section 9, require suppression of a confession obtained by repeated coercive questioning initiated by police after a suspect in custody has invoked his right to remain silent.

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No. 92-222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent

Petition for Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Only the opinions of the courts below in the instant case have been provided in the Appendix and Supplemental Appendix filed by Petitioner.

The opinion of the Supreme Court of Tennessee in the companion case of State v. Smith, No. 03-S-01-9107-CR00054 slip op. (Tenn. May 18, 1992), decided the same day as the instant State v. Crump and whose content fully explains the grounds for the Crump decision below, is reprinted in the Appendix of Respondent attached (App.

Resp.).[1] Both the Smith and Crump opinions are designated for publication in _____ S.W.2d_____.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 18, 1992. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court purportedly was invoked under 28 U.S.C. §1257(a). However, as Respondent's Brief will show, there is an adequate and independent basis for the decision below in the constitutional law of the State of Tennessee, which deprives this Court of jurisdiction and would render merely advisory any opinion this Court might render on the federal constitutional issue contained in the Petition.

ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

Tenn. Const. Art. 1, § 9

Right of the accused in criminal prosecutions. -- That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the

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[1] The State v. Smith companion opinion, which Petitioner did not include in either the Appendix or Supplemental Appendix, is being provided to the Court by Respondent in compliance with Supreme Court rules 14.1(k)(ii) and 15.1.

County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

STATEMENT

Respondent is an inmate in the Tennessee Department of Correction. In September, 1988, he was arrested on suspicion of escape and of murder in Nashville, Davidson County, Tennessee, and later indicted on charges of escape, assault and first-degree murder. The present appeal arises from rulings on a pretrial motion to suppress. No trial has been held.

Although the terse Statement of the Case in the Petition (written without a single citation to the Record on Appeal or to any of the opinions of the courts below) misstates numerous issues of fact,[2] Respondent calls the Court's attention to only those misstatements of fact or law that might mislead the Court as to those issues that might properly be before it in the event a writ of certiorari should issue:

I. Basis of Constitutional Violations

The Petition asserts that Respondent argued below only that police failed to "scrupulously honor" his invocation to the "right to [remain] silen[t]," that his statements were involuntary, and that he "invoked his Sixth Amendment right to counsel" at the

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[2] E.g., Petitioner states that Respondent was taken by "Detective Moore and another officer" in a squad car to the scene of the escape, but all testimony and the findings of all courts below were that three officers accompanied Respondent. Compare Pet. 4 with App. 3-4.

beginning of the tape-recorded statement at police headquarters. Pet. 3. In fact, Respondent argued at all stages below, beginning at the pretrial suppression hearing, that the police actions violated his separate and specific State and federal constitutional rights not "to give evidence against" (State) and "not to be a witness against" (federal) himself; his separate and specific State and federal constitutional rights to counsel when questioned in custody;[3] his separate and specific State and federal constitutional rights not to have involuntary confessions used against him (state "law of the land" and federal "due process"); his Miranda rights; and his rights under Rule 5(a), Tenn. R. Crim. P., to be brought before a magistrate without undue delay.

Of those categories of argument, only one was ruled upon by the Supreme Court of Tennessee. That court specifically declined to rule on the involuntariness (due to physical coercion) and right to counsel claims (State or federal). App. 4-5 nn.1,2. The Rule 5(a) argument has not been reached by any court below.[4]

With respect to the self-incrimination rights (State and federal), Respondent at all stages below specifically relied upon

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[3] Respondent's argument that he was entitled to a cessation of questioning upon asking for counsel during custodial interrogation was, of course, as a federal matter, an invocation of the Fifth Amendment, not the Sixth Amendment (although this aspect of the Fifth Amendment serves both Fifth and Sixth Amendment purposes). Equally obviously, these rights are made applicable to the States through the Fourteenth Amendment due process clause.

[4] Petitioner has indicated below that it is prepared to go forward with this prosecution regardless of the appellate outcome on the suppression issue. Even on the suppression issue, three of the asserted grounds have not been dealt with as a final matter (and one of them not at all, even by the trial court).

Article I, Sections 8, 9, 13 and 16 of the Tennessee Constitution. Counsel devoted significant portions of written and oral argument to the State constitutional provisions (particularly Article I, § 9) as a proposed independent basis for decision. Following oral argument, counsel for Respondent supplied the Supreme Court of Tennessee an invited post-argument written submission on certain state issues. As discussed below, the Supreme Court of Tennessee responded to these arguments.

II. Concession of Michigan v. Mosley violation

The State conceded both at the pretrial hearing and on appeal that any statements made by Respondent prior to the second set of Miranda warnings should not be admitted at trial under the "scrupulously honored" principle of Michigan v. Mosley, 423 U.S. 96 (1975). Transcript of Proceedings, Vol. 3, at 108-110.

III. Opinions of the Tennessee Supreme Court in State v. Crump and State v. Smith

Obviously, this Court has the two companion opinions before it for its own review. It may be helpful to point out a few features of these opinions, however.

A. State v. Crump

The Tennessee Supreme Court found that Respondent replied to the Miranda warnings by saying either "I don't have anything to say right now," or "I don't have anything to say." App. 2,12. The court, as had both inferior courts below it, found that these words invoked the relevant State and federal self-incrimination rights. It then found that continued interrogation in the face of that invocation was a violation of constitutional dimension. App. 12. For those holdings, the court relied on O'Brien v. State, 221 Tenn. 346, 350, 426 S.W.2d 507, 508 (1968) and State v. Hartley, 103 N.J. 252, 273, 511 A.2d 80, 91 (1986). Hartley in turn relied on both New Jersey and federal constitutional law.

At the outset of its legal discussion, the Supreme Court of Tennessee held that "the test of voluntariness for confessions under Article I, §9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. See State v. Smith, _____ S.W.2d _____ (Tenn. 1992)." App. 7.

Having thus found that the police violated Respondent's State and federal constitutional rights, the court turned to whether the "subsequent taped confession was involuntary and whether it must be excluded as the tainted 'fruit' of the constitutional violation."

App. 14. The court conducted its inquiry "[g]uided by the voluntariness factors set forth in State v. Smith, _____ S.W. 2d at _____," and found that "at the time of his confession, the defendant was still laboring under the psychological impact of having already confessed and 'let the cat out of the bag' during the drive." To determine whether the "cat out of the bag" problem had "vitiate[d] voluntariness," the court further examined the circumstances of the "stream of events" and held that the State had "failed to successfully rebut the presumption that the illegally-obtained, initial statements given on the drive also tainted the subsequent confession." For this analysis, the court again (twice) cited State v. Smith, using blank pinpoint citations to be filled in later. Pet. 15-16.

The court held further that the subsequent confession was tainted as "fruit of the poisonous tree" resulting from the initial constitutional violations, citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975) and State v. Chandler, 547 S.W.2d 918, 920 (Tenn. 1977). App. 16. A two-justice dissent agreed that Respondent's "invocation of his right to remain silent was not scrupulously honored," but argued that the record did not establish "deliberately coercive or improper tactics," and therefore concluded that the "police failure" did not "rise to the level of a constitutional violation" of either the Fifth Amendment or Article I, § 9. App. 18.

B. State v. Smith

In this companion case, the Supreme Court of Tennessee unequivocally rejected, as part of the constitutional law explicating Tenn. Const. Article I, §9, the portion of the decision of this Court in Oregon v. Elstad, 470 U.S. 298 (1985) that dealt with the "cat out of the bag" theory:

> We believe that adherence to the spirit and principles of Article I, §9 of the Tennessee Constitution requires us to recognize, as a matter of Tennessee constitutional law, the inherent reasonableness of the underlying premise expressed in [United States v.] Bayer[,331 U.S. 532 (1947)] and Martin [v. State, 1 Tenn. Crim. App. 282, 291, 440 S.W.2d 624, 628 (1968)]. Consequently, we dispute the rationale of the Elstad decision that, absent coercion in eliciting an initial confession, psychological pressures and other pressures flowing from that confession can never lead a defendant to give subsequent, involuntary, incriminating statements.

State v. Smith, App. Resp. 10-12. The court then relied upon Justice Brennan's dissent in Elstad, 470 U.S. at 328, 335, and created a rebuttable presumption (simultaneously employed in Crump) that the prosecution must overcome in subsequent-confession cases, including those involving the mere absence of initial Miranda warnings, as in Elstad and Smith. App. Resp. 12. The Court was clear and unequivocal:

> Our ruling today that an illegally-obtained, initial confession is presumed, subject to rebuttal, to have tainted any subsequent confession, even if the later statement is preceded by proper Miranda warnings, expressly rejects the United States Supreme Court majority holding in Elstad v. Oregon.

App. Resp. 16.

Henceforth, in cases involving confessions given subsequent to an initial, illegally obtained confession, Tennessee courts must decide whether an accused has voluntarily confessed and made "a free and informed choice to waive the State constitutional right not to provide evidence against one's self." App. Resp. 12-13 (emphasis added). To address these issues, courts are to examine nine specific factors. Id. 13. The court below explained its reasoning at several points. See, e.g., id. 8, 11, 16-17.

In Smith, the court found that the subsequent confession was given knowingly and voluntarily. In Crump, as noted above, application of this same new standard on the same day produced the opposite result. The court noted that it was "guided by the voluntariness factors" set forth in Smith and cited Smith for its rebuttable-presumption approach (adopting the Brennan dissent in Elstad) to the "cat out of the bag" issue. App. 15-16.

ARGUMENT

I. There is an Adequate and Independent Basis for the Decision Below in State Constitutional Law.

Petitioner's arguments are utterly specious that the decision below should be presumed to rely on federal law under Michigan v. Long, 463 U.S. 1032, 1041 (1983). Pet. 11-12 n.1. It will be obvious from the discussion above that this lengthy jurisdictional footnote in the Petition is littered with misstatements. Petitioner, never citing specifically to the companion Smith decision, deploys a meaningless jurisdictional analysis of numerology oddly bereft of legal analysis, claiming that the majority opinion in Crump "cites a total of eleven federal cases and four state cases, presumably to demonstrate that the State courts have followed federal law in the past." Id. Equally without foundation are the Petition's statements that the court below "did not give any explanation of the basis for this greater protection" of State constitutional law, "gave no indication" that these State protections commanded the decision reached, and "felt compelled by the federal constitution" to suppress the confession.

It is clear from the decision below, particularly when read in light of the companion Smith opinion to which it cites extensively and specifically, that the adequacy and independence of the State law ground is "clear from the face of the opinion," and thus the presumption of Michigan v. Long is inapplicable. 463 U.S. at 1040-41. The "plain statement" doctrine of Long is applicable when a state court "chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions." Id. No such

practice was followed below. The court in Crump (and in Smith) made it clear that it was rejecting an aspect of federal law to craft independent state constitutional law. This clear expression that the decision was "alternatively based on bona fide separate, adequate, and independent grounds" precludes jurisdiction under Long. Id. at 1041. See Coleman v. Thompson, _____ U.S. _____, 111 S.Ct. 2546 115 L. Ed.2d 640, 657-58 (1991); California v. Freeman, 488 U.S. 1311, 1313-14 (1989) (O'Connor, Circuit Justice).

In the face of such clear fashioning of independent State constitutional law, any review of federal law issues by this Court ultimately would result only in the issuance of an advisory opinion. See Freeman, 488 U.S. at 1314.

II. In Any Event, the Federal Law Issues Below Were Decided Correctly As an Alternative Basis for the Result.

Even if this Court were to assume jurisdiction, the federal law portion of the decision below represents only a careful and correct application of the Oregon v. Elstad and Michigan v. Mosley case law. The Supreme Court of Tennessee specifically adverted to an exchange of footnotes in the Elstad opinion between the majority and the principal dissenter in distinguishing the circumstances in Elstad from those in the present case. App. 13 (citing Elstad, 470 U.S. at 312-13 n.3 (majority) and 346 n.28 (Brennan, J., dissenting)).

In noting this distinction, the court below was following other courts who similarly have perceived the difference between a

simple police failure to administer Miranda warnings and a "failure to honor, after they have been asserted, the constitutional rights those warnings are designed to secure." App. 13 (quoting State v. Hartley, 103 N.J. at 272, 511 A.2d at 90).

Contrary to Petitioner's assertions, the court below did not hold, and it was in no way the case, that the police conduct here was a mere "technical violation" of Michigan v. Mosley, 423 U.S. 96 (1975) and Miranda v. Arizona, 384 U.S. 436 (1966). App. 15-17.

In Mosley this Court labeled "absurd" any argument that police interrogators could be allowed to resume interrogation after only a "momentary respite" following a suspect's invocation of his right to remain silent:

> To permit the continuation of the custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

423 U.S. at 102.

What the officers actually did in the present case was to deliberately subject Respondent to an immediate and prolonged period of incommunicado interrogation during which they hoped and expected he would give them the incriminating responses they sought. According to police testimony, Respondent was handcuffed throughout the psychologically coercive ride-around that, among other things, retraced the alleged route followed by the perpetrator of the crimes charged. App. 4. Further according to police testimony, the officer to whom Respondent invoked his rights informed his supervisor of that fact, but the supervisor (who later

could not recall being so informed) took Respondent out in the squad car with two other officers for the ride-around. App. 3; Pet. 3. The first officer, upon observing Respondent when the foursome returned, noted signs of "mental abuse." App. 5,15. The supervising officer described other visible psychological effects upon Respondent as a result of trickery and other psychological ploys used as interrogation techniques. App. 4,15. Another officer testified that the purpose of the tape-recorded statement was merely to "get more detailed information" in light of the statements made during the ride-around, and to get those statements on tape. Tape Recording of Preliminary Hearing, Exhibit 12 to Hearing on Motion to Suppress Statements. Finally, it must be remembered that, although what was said was not ruled upon by the court below, it is undisputed that at the precise point in the Miranda warnings that preceded the tape-recorded statement at which the availability of a lawyer is described, Respondent clearly said something which the police heard but flatly ignored with an admonition not to interrupt. App. 27, 42. Respondent has insisted that the tape reveals he said "I want one now." Petitioner's position has been that the tape reveals Respondent said "I don't want nairn." Thus, rather than being "inaudible," Pet. 4, the interruption to the tape-recorded warnings is "poorly audible,"[5] and absolutely establishes that Respondent interrupted the warnings

[5]In an effort to aid explication of the tape, Respondent below proffered to the intermediate appellate court and to the court immediately below sworn statements from a skilled linguist attesting that her expert analysis supports Respondent's version of what he said.

when told he could have a lawyer. Such an interruption (even if its content cannot be deciphered presently with confidence) at a minimum imposed a duty upon the police to seek clarification. The interruption further casts a cloud over any attempt to use that second set of Miranda warnings to establish either a knowing and voluntary waiver of his rights by Respondent, or a break in the exploitation of evidence sufficient to establish attenuation under Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1992

APPENDIX OF RESPONDENT

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	Filed: May 18, 1992
Plaintiff-Appellee,	)	
	)	COCKE COUNTY CIRCUIT
	)	
	)	HON. J. KENNETH PORTER, JUDGE
VS.	)	
	)	
	)	S/C No. 03-S-01-9107-CR 00054
HOSIE VAN SMITH,	)	
	)	
Defendant-Appellant.	)	

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O P I N I O N

AFFIRMED. ANDERSON, J.

The primary issue raised on this appeal is whether the defendant's confession, obtained after proper administration of Miranda warnings, is inadmissible at trial because a prior incriminating statement was obtained in violation of the Fifth Amendment of the United States Constitution and Article I, § 9 of the Tennessee Constitution. The initial incriminating statement made by the defendant, Hosie Smith, before any Miranda warning was given to him was suppressed. A later confession was obtained after a search had revealed cocaine in Smith's possession and after the police had read Smith his Miranda rights. The admissibility of the confession was challenged on the grounds it was involuntary and tainted as the fruit of the first unwarned incriminating statement given in violation of the Federal and State Constitutions. After the trial court overruled the defendant's motion to suppress his confession, Smith was convicted of possessing more than 30 grams of cocaine with the intent to deliver, sentenced to 30 years incarceration, and fined $10,000.00. The conviction was affirmed by the Court of Criminal Appeals, after that court determined that the confession was given knowingly and voluntarily, and was thus admissible at trial. We likewise conclude that the confession was knowing and voluntary on the grounds set out herein and, therefore, affirm.

FACTUAL HISTORY

On October 28, 1988, Officers Mike Hannan and Terry Thomas of the Tennessee Highway Patrol were traveling west on I-40 in Cocke County when they clocked a Ford Taurus station

wagon traveling east at 84 miles per hour in a 65 miles-per-hour zone. As a result, the officers turned around in the median and, at approximately 5:20 p.m., stopped the vehicle that was being driven by Kellie Alisha Jones and in which the defendant was riding.

After stopping the car, Officer Hannan approached the driver's side of the vehicle and asked Jones for her license and registration. Jones was able to produce her license, but was unable to find the vehicle's registration. When Officer Hannan asked Jones to whom the car belonged, she responded that her mother, Renee Preston, owned the car.

Because it was raining, Officer Hannan then asked Jones to exit her vehicle and accompany him to his squad car while he wrote out a traffic citation. Jones agreed and exited her vehicle, after asking Smith to keep looking in the glove compartment for the vehicle's registration.

While Smith was looking for the registration, Officer Thomas, who had approached the passenger's side of the car during Officer Hannan's conversation with Jones, asked Smith questions regarding ownership of the car and the couple's destination. Smith told Officer Thomas that the car belonged to a friend of his, and that he and Jones were headed to Fayetteville, North Carolina. When Officer Thomas asked if he was going to Fayetteville on vacation, Smith responded in the negative and stated that he was going there to stay.

After this brief conversation with Smith, Officer Thomas returned to the squad car and sat in the back seat. While waiting for radio verification of Jones's license and the vehicle's registration, both officers continued to question Jones. Although she stated that the car belonged to her mother, Renee Preston, Jones could not explain the difference in the last names after answering "no" to Officer Hannan's question of whether her mother had remarried. In response to questions about the couple's destination, Jones said they were headed to Fayetteville for a one-week vacation. When asked who her passenger was, Jones stated that it was her boyfriend, but she could only give the name "Pumpkin" in response to questions about his name.

Because Smith and Jones appeared to be extremely nervous and because of the inconsistencies in their responses to questioning, the officers became suspicious and asked Jones if she was carrying any illegal items, weapons, or contraband. When Jones denied knowledge of such cargo, both officers asked her if they could have permission to look in the vehicle and its contents. At the time she was asked this question, the officers told her that she could refuse, but Jones agreed to let the officers look through the car.

While Officer Hannan was completing the traffic citation, Officer Thomas re-approached the station wagon on the passenger side and conversed again with Smith. At this time, Officer Thomas asked Smith if there were any illegal items in the car. Smith denied knowledge of any such contraband. Thomas then advised Smith that Jones had given the

officers permission to look through the vehicle and that if anything illegal were found in the car, ownership of the illegal items would be attributed to both of them.

Although Smith denied having knowledge of anything illegal being in the car, Thomas asked him again. After hesitating, Smith said, "Yes, it was probably a hot load." Thomas then asked, "By a hot load, do you mean cash, marijuana, or cocaine, one of the three?" Smith responded, "Probably."

Following this conversation, Officer Thomas began searching the station wagon. He searched the front and back seat areas before attempting to open and search the back storage compartment area. When he was unable to open the back of the station wagon with the key from the ignition, Officer Thomas crawled over the back seat into the rear storage area and discovered a locked indentured compartment.

Because he was unable to open the indentured compartment with the ignition key and because it was raining heavily, Officer Thomas asked Jones if they could take the car to a service station to break open the compartment. Jones agreed and at approximately 6:00 p.m., Officer Thomas drove the station wagon to the service station after placing Smith in the back seat of the patrol car to ride with Officer Hannan and Jones. At the service station, with Smith still in the back seat of the patrol car, the officers broke open the compartment and found a cardboard box containing 10,000 grams (22 pounds) of 94 percent pure cocaine wrapped in 10

individual packets. Upon discovering the cocaine, at approximately 6:25 p.m., the officers placed both Smith and Jones under arrest, read them their Miranda rights, and transported them to Highway Patrol Headquarters.

At 9:45 p.m., Smith was questioned by Officer Lonnie Hood. Before he was questioned, Smith was read his Miranda rights again and signed a written waiver of those rights. During the course of the interrogation, Smith gave Officer Hood an incriminating account of his employment to drive the station wagon with Jones from Oklahoma City, Oklahoma, to Fayetteville, North Carolina. This statement was reduced to writing by Officer Hood and signed by Smith.

Following a suppression hearing, the trial court held that Smith's statements about the vehicle containing a "hot load" prior to his being Mirandized were inadmissible. The trial court held, however, that the cocaine was admissible at trial as the fruit of a valid consensual search, and that the later written confession signed by Smith was admissible because it had been given freely, knowingly, and voluntarily.

The case proceeded to trial before a jury and Smith was convicted of possessing cocaine in excess of 30 grams with the intent to deliver, in violation of Tenn. Code Ann. § 39-6-417 (1982 & Supp. 1988). The jury fined Smith $10,000.00, and the court sentenced him to serve 30 years in the Department of Corrections as a Range I offender.

The Court of Criminal Appeals affirmed the conviction and sentence.

DISCUSSION

I.

The dispositive issue in this case involves the admissibility of the confession given to Officer Hood and signed by Smith at the Highway Patrol Headquarters. The defendant contends that the confession was inadmissible because it was obtained in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. Smith argues that his waiver of rights and his statement to Officer Hood were not voluntary, because they were tainted by Officer Thomas' conduct in first questioning Smith on the side of the interstate without administering Miranda warnings.

The Fifth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I., § 9. Although these provisions are not identical, this Court has previously declined to hold that protection under the state constitution is broader than that of the federal constitution

merely because the language of the two provisions is not the same. Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). This observation, however, does not foreclose the possibility that the state constitutional provision might be applied more broadly than its federal counterpart, based upon considerations other than, and in addition to, the difference in terminology.

Prior to the decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the admissibility of an accused's in-custody statements depended on whether the statements were "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. See, e.g., Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). In Miranda, however, the United States Supreme Court limited the admissibility of statements that would ordinarily meet the due process test of voluntariness in order to protect an accused's Fifth Amendment rights to be free from self-incrimination.

In order to combat the inherently compelling pressures of in-custody interrogation and to permit a full opportunity to exercise the privilege against self-incrimination, Miranda held that, prior to being subjected to custodial interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda, supra, 384 U.S. at 467, 86 S. Ct. at 1624. The court also held that "the prosecution may not use statements, whether exculpatory, or inculpatory, stemming from custodial interrogation of the

defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., 384 U.S. at 444, 86 S. Ct. at 1612.

The court then instructed that, at a minimum, those procedural safeguards must include warnings prior to any custodial questioning that the accused has the right to remain silent, that any statement made may be used as evidence against the accused, and that the accused has the right to have an attorney, whether retained or appointed, present during questioning. Id. To further protect an accused's self-incrimination rights, the court also held that although these rights may be waived, the waiver must be made "voluntarily, knowingly, and intelligently." Id.

Following Miranda, a Supreme Court majority has held that the prophylactic Miranda warnings are not themselves rights protected by the Constitution, but are instead measures designed to ensure that the right against compulsory self-incrimination is protected and intelligently exercised. See, e.g., Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). Nevertheless, even the Elstad majority agreed that "[f]ailure to administer Miranda warnings creates a presumption of compulsion." Elstad, supra, 470 U.S. at 307, 105 S.Ct. at 1292. Furthermore, that presumption is irrebuttable and "unwarned statements that are otherwise voluntary within the

meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda." Id.

In Elstad, a majority of the United States Supreme Court decided that, in a situation similar to that faced by the defendant in this case, a trial court must conclude that an initial confession obtained without prior warnings regarding the right against self-incrimination is inadmissible. The court went on to hold, however, that the presumption of compulsion attaching to an unwarned confession does not also apply to a subsequent confession obtained after administering Miranda warnings. In discussing the admissibility of such a second confession at trial, the court stated:

> [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Id., 470 U.S. at 314, 105 S. Ct. at 1296.

This holding by the United States Supreme Court represented a clear break with past precedent embracing the "cat out of the bag" theory espoused in United States v. Bayer, 331 U.S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947). In Bayer, the court recognized:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id., 331 U.S. at 540, 67 S. Ct. at 1398. See also Martin v. State, 1 Tenn. Crim. App. 282, 291, 440 S.W.2d 624, 628 (1968). Even in Bayer, however, the United States Supreme Court refused to hold that an illegally-obtained confession would forever foreclose the possibility that a subsequent admissible confession could be elicited from the defendant. In fact, in that case, the court determined that the subsequent confession given six months after the defendant's first statement would not be held invalid when the "only restraint under which [the defendant] labored was that he could not leave the . . . limits [of the military base on which he lived] without permission." Bayer, supra, 331 U.S. at 541, 67 S. Ct. at 1398.

We believe that adherence to the spirit and principles of Article I, § 9 of the Tennessee Constitution requires us to recognize, as a matter of Tennessee constitutional law, the inherent reasonableness of the underlying premise expressed in Bayer and Martin. Consequently, we dispute the rationale of the Elstad decision that, absent coercion in eliciting an initial confession, psychological pressures and other pressures flowing from that confession can never lead a defendant to give subsequent, involuntary, incriminating

statements. As noted in Justice Brennan's dissent in Elstad, even standard interrogation manuals used by law enforcement agencies recognize that "[i]f the first admission can be obtained, 'there is every reason to expect that the first admission will lead to others, and eventually to the full confession.'" Elstad, supra, 470 U.S. at 328, 105 S. Ct. at 1303 (Brennan, J., dissenting).

Like the court in Bayer, however, we also refuse to hold that an initial, illegally-obtained confession forever bars the prosecution from obtaining a subsequent, admissible confession from the defendant. Rather, we hold that the provisions of Article I, § 9 of the Tennessee Constitution necessitate that we recognize that extraction of an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession, even if preceded by proper Miranda warnings, is tainted by the initial illegality. That presumption may be overcome by the prosecution, however, if the State can establish "that the taint is so attenuated as to justify admission of the subsequent confession." Elstad, supra, 470 U.S. at 335, 105 S. Ct. at 1306-07 (Brennan, J., dissenting).

In each such case, the crucial inquiry for the courts becomes whether the events and circumstances surrounding and following the initial, illegal conduct of the law enforcement officers prevented the accused from subsequently (1) making a free and informed choice to waive the State constitutional right not to provide evidence against one's self, and (2) voluntarily confessing his involvement in the

crime. In addressing these questions, courts should examine the following factors:

1. The use of coercive tactics to obtain the initial, illegal confession and the causal connection between the illegal conduct and the challenged, subsequent confession;

2. The temporal proximity of the prior and subsequent confessions;

3. The reading and explanation of Miranda rights to the defendant before the subsequent confession;

4. The circumstances occurring after the arrest and continuing up until the making of the subsequent confession including, but not limited to, the length of the detention and the deprivation of food, rest, and bathroom facilities;

5. The coerciveness of the atmosphere in which any questioning took place including, but not limited to, the place where the questioning occurred, the identity of the interrogators, the form of the questions, and the repeated or prolonged nature of the questioning;

6. The presence of intervening factors including, but not limited to, consultations with counsel or family members, or the opportunity to consult with counsel, if desired;

7. The psychological effect of having already confessed, and whether the defendant was advised that the prior confession may not be admissible at trial;

8. Whether the defendant initiated the conversation that led to the subsequent confession; and

9. The defendant's sobriety, education, intelligence level, and experience with the law, as such factors relate to the defendant's ability to understand the administered Miranda rights.

In ruling upon the admissibility of a subsequent confession following the determination that an initial, unwarned confession may not be introduced in the State's case-in-chief, no single factor listed above is determinative. Rather, a court must examine the totality of the circumstances surrounding the two confessions to determine whether the subsequent confession by the defendant can truly be termed a knowing and voluntary statement.

The facts of this case demonstrate that Smith's subsequent confession was given knowingly and voluntarily. No coercive tactics were employed by the law enforcement officials to elicit either the first or the second incriminating statement given by the defendant. More than three hours elapsed between the time Smith was arrested and first given his Miranda warnings and the time when he gave his second confession to the authorities. There is no evidence in the record that Smith was in any way mistreated during that time period or that he was prevented from contacting friends, family or legal counsel. Additionally, Smith had been advised of his Miranda rights twice before his second statement was given (once at the time of his arrest and again immediately before the second statement), both the interrogators and the place of interrogation changed from the first illegally-obtained confession, and there is no indication that Smith did not fully understand the rights explained to him.

In fact, Smith acknowledged that he understood his rights and signed a written waiver of them. In response to

questioning, Smith proceeded to give Officer Hood a statement of his involvement in the crime. There is no evidence that the interrogation producing the statement was unduly prolonged so that it could be characterized as an effort to wear down Smith's resistance and overcome his free will.

The only coercive influence apparent in this record is the fact that Smith was in police custody at the time of his statement and at all relevant times after his arrest. Although police custody is inherently coercive and compelling, if we were to hold this single factor sufficient to vitiate the voluntariness of a subsequent confession, an accused could never give a voluntary confession after arrest. We are unwilling to condone such a result because of our belief that "[c]onfessions remain a proper element in law enforcement." Miranda, supra, 384 U.S. at 478, 86 S. Ct. at 1630.

In short, our examination of the totality of the circumstances surrounding Smith's initial statement, his arrest and detention, and his subsequent confession leads us to the inescapable conclusion that Smith knowingly and voluntarily waived his right against self-incrimination prior to giving the written confession introduced at trial in this matter. The prosecution successfully rebutted the presumption that the illegally-obtained, initial statement given on the side of Interstate 40 also tainted the subsequent confession given by Smith. As a result, that second statement was properly admitted at trial.

Our ruling today that an illegally-obtained, initial confession is presumed, subject to rebuttal, to have tainted any subsequent confession, even if the later statement is preceded by proper Miranda warnings, expressly rejects the United States Supreme Court majority holding in Elstad v. Oregon. We believe, however, that the provisions of Article I, § 9 of the Tennessee Constitution mandate that the State, after illegally obtaining an incriminating statement from a defendant, must establish that the subsequent confession was given freely and voluntarily and that the constitutional right to be free from self-incrimination was not waived due solely to the psychological pressures resulting from giving the previous statement. Only then can we be assured that criminal defendants are not being unconstitutionally compelled "to give evidence against [themselves]."

The Concurring Opinion expresses concern that our retention of the "cat out of the bag" rule that an illegally obtained initial confession is presumed, subject to rebuttal, to taint a later confession will enable defendants to have confessions suppressed by merely demonstrating that their arrest and detention was psychologically stressful. This concern is unfounded because the "cat out of the bag" theory was adopted in 1947 by the U. S. Supreme Court in United States v. Bayer, supra, and was followed until the Court's split decision in 1985 in Oregon v. Elstad, supra, and there is no evidence that confessions were suppressed during that nearly 40-year period by merely showing that arrest and detention was stressful. In addition, as previously pointed out, Bayer, the case that espoused the "cat out of the bag"

theory, expressly recognized that the first inadmissible confession does not perpetually disable a defendant from subsequently giving an admissible confession.

II.

The defendant also contends that the consensual search of the station wagon was not valid because the officers never asked him for permission to search the car. Persons having equal rights to use or occupy premises may, however, consent to a search of them and the consent will be binding upon the co-occupants. Frazier v. Cupp, 394 U.S. 731, 740, 89 S. Ct. 1420, 1425, 22 L. Ed. 2d 684 (1969); Lester v. State, 216 Tenn. 615, 620, 393 S.W.2d 288, 290 (1965). Because Kellie Jones had an equal right to use and occupy the vehicle, her voluntary consent to search is valid and binding upon Smith as well. There is no merit to this issue.

III.

Finally, the defendant submits that the sentence imposed upon him after conviction was excessive. We concur in the conclusion of the Court of Criminal Appeals that this issue is also without merit.

The defendant's conviction is affirmed in all respects. The costs of this appeal are adjudged against the defendant.

E. RILEY ANDERSON, Justice

Concur:

Reid, C.J., and Daughtrey, J.
Drowota and O'Brien, JJ. (Separate Concurring Opinion)

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE, Plaintiff-Appellee, V. HOSIE VAN SMITH, Defendant-Appellant.	FOR PUBLICATION COCKE CIRCUIT Hon. J. Kenneth Porter, Judge S/C No. 03S01-9107-CR-00054

CONCURRING OPINION

I would affirm but apply the rule announced by the United States Supreme Court in Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed.2d 222 (1985). Specifically, I agree with that Court that "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary." Id. at 318, 105 S. Ct. at 1297-98.

In Elstad, the United States Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id. at 318, 105 S. Ct. at 1298. Under Elstad, the factfinder is directed to "examine the surrounding circumstances and the entire course of police conduct" and thereby reach a determination as to whether the defendant's post-Miranda statement was

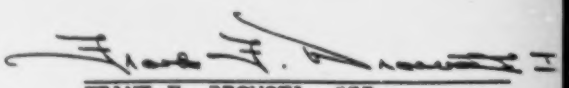
voluntarily made, see id.; because the trial court properly conducted this inquiry, I would affirm.

While the majority purports to adopt a presumption, apparently gleaned from Justice Brennan's dissent in Elstad, that an illegally obtained initial confession taints any subsequent confession, I submit that the majority does nothing more than examine the totality of the circumstances in order to determine whether Smith's post-Miranda statement was voluntarily made.

Further, the "psychological stress" component of the majority's presumption, see supra at __ ("the State . . . must establish that the subsequent confession was given freely and voluntarily and that the constitutional right to be free from self-incrimination was not waived due solely to the psychological pressures resulting from giving the previous statement"), gives reason for pause: Were the majority to actually apply Justice Brennan's "cat out of the bag" presumption, it is difficult to imagine that Smith's post-Miranda statement would be found free of taint. Smith waived his Miranda rights a mere three hours after his initial statement, and at a time when he was burdened by the "psychological stress" of knowing the police found 10,000 grams (22 pounds) of 94 percent pure cocaine in his car.

Finally, because Defendant's subsequent confession is clearly admissible, I decline the opportunity to circumscribe the boundaries of Article I, Section 9, of the Tennessee Constitution.

I am authorized to state that Justice O'Brien concurs in this concurring opinion.



FRANK F. DROWOTA, III
JUSTICE